

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

AVERY DENNISON CORPORATION,

Plaintiff,

vs.

THE HOME TRUST & SAVINGS
BANK,

Defendant.

No. 02-2007 LRR

**ORDER REGARDING MOTION FOR
SUMMARY JUDGMENT**

This matter comes before the Court pursuant to the Motion for Summary Judgment (docket no. 11) of Defendant The Home Trust & Savings Bank (the "Bank").

I. STANDARD OF REVIEW

Summary judgment is appropriate only when the record, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997) (citing *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996)). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). A fact is material when it "might affect the outcome of the suit under the governing law." *Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999). In considering a motion for summary judgment, a court must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus.*, 475 U.S. at 587. Further, the court must give such party the benefit of all reasonable inferences that can be drawn from the facts. *Id.*

The moving party bears "the initial responsibility of informing the district court of

the basis for its motion and identifying those portions of the record which show lack of a genuine issue.” *Hartnagel*, 953 F.2d at 394 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits or otherwise, designate “specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must offer proof “such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

II. FACTUAL BACKGROUND

The following facts are undisputed. Plaintiff Avery Dennison Corporation (“Avery”) is in the business of selling sticky paper. Avery sells to converters bulk rolls of paper with adhesive on it. The converters then turn the paper into labels of all different types. Avery has two unincorporated divisions: office products and Fasson. The office products division makes office products such as pens, notebooks, and binders. The Fasson division involves board stock material that makes tags.

Group One/Veritec (“Group One”) was a customer of Avery’s. Group One and Avery entered into a contract to which the Bank was not a party. Avery’s contract with Group One provided Group One with a \$300,000.00 line of credit with terms of “net 30 days.” Terms of “net 30 days” means that Group One was allowed 30 days from the invoice date to pay that invoice and Group One was not in default on the invoice until 30 days after the invoice date. The Bank was unaware of the terms of the underlying contract between Avery and Group One.

To guarantee Group One’s payment to Avery, Matthews Group, L.L.C. (the “Matthews Group”) obtained a \$100,000.00 letter of credit from the Bank. The Bank issued the letter of credit on May 12, 2000.

The letter of credit provided that a demand for payment thereunder must contain a

statement signed by an authorized official of the beneficiary certifying that “AN EVENT HAS OCCURRED UNDER THE CREDIT AGREEMENT BY AND AMONG FASSON/AVERY DENNISON CORPORATION AND VERITEC, INC., WHICH ALLOWS THE BENEFICIARY TO DRAW ON LETTER OF CREDIT NUMBER 104.” The letter of credit further provided that “ALL DRAFTS MUST BE MARKED ‘DRAWN UNDER MATTHEWS GROUP, LLC STANDBY LETTER OF CREDIT NUMBER 104, DATED MAY 12, 2000.’” The letter of credit was silent as to whether the Matthews Group could cancel it at any time or tell the Bank not to pay on it.

The letter of credit originally was scheduled to expire on August 12, 2000. Pursuant to the Matthews Group’s monthly requests, the letter of credit was renewed and extended on a month-to-month basis after the original expiry date. The expiration dates always were scheduled for the twelfth day of the month. The monthly extension letters were prepared by or on behalf of Richard Bodensteiner (“Bodensteiner”), Vice-President for the Bank, pursuant to the Matthews Group’s instructions. The letters of extension usually were received by Linda Nicholson (“Nicholson”), Avery’s Manager of Customer Financial Services, two to three days before the expiration date. Nicholson occasionally would contact Bodensteiner or a representative of the Matthews Group to make sure the extensions were granted.

On August 8, 2001, Nicholson contacted Van Tran (“Tran”), a principle at the Matthews Group, to inquire whether the letter of credit would be renewed for the next month. Tran responded that she could “see no reason why we are not going to.” However, Avery did not receive a renewal notice indicating that the letter of credit was extended an additional month. Nicholson attempted to contact Tran on August 9 and on the morning of August 10. When Avery was unable to secure confirmation that the letter of credit would be renewed, Nicholson called the Bank on Friday August 10, 2001 at 3:30 p.m., Central Daylight Time, to inquire as to the status of the renewal notice. Bodensteiner informed

Nicholson that the Matthews Group did not renew the letter of credit. Thus, the final expiry date of the letter of credit was Sunday, August 12, 2001. On August 10, 2001, the Matthews Group had instructed the Bank not to pay Avery on a demand on the letter of credit.

During their telephone conversation on August 10, 2001, Nicholson told Bodensteiner that Avery wished to draw on the full amount of the letter of credit. Bodensteiner advised Nicholson that the Bank would refuse to honor Avery's demand because it did not meet the Bank's deadline. The Bank considered everything received after 3:00 on Fridays to be the following Monday's business. Prior to August 10, 2001, the Bank had not informed Avery that its close of business on Fridays was 3:00 p.m. Nicholson told Bodensteiner that she was going to send the Bank the required documents to draw on the letter of credit. Nicholson asked Bodensteiner if he could help her "make sure [she had] everything [he] need[ed] to do it." Bodensteiner responded, "[i]t doesn't matter what you do, we are not going to pay it."

On August 10, 2001, Nicholson gathered and sent documents via facsimile transmission to the Bank to draw on the letter of credit. After sending the documents via facsimile transmission, Nicholson called and confirmed that the Bank had received the documents. The Bank received the documents sent via facsimile transmission on Friday, August 10, 2001, at 4:30 p.m., Central Daylight Time. In her letter sent via facsimile transmission, Nicholson specifically requested that Bodensteiner contact her with any questions regarding the transaction.

During their conversation on August 10, 2001, Nicholson told Bodensteiner that she was also going to send the documents by Federal Express for Saturday delivery. Bodensteiner advised Nicholson that the Bank was not open on Saturdays. Prior to August 10, 2001, Bodensteiner had not told Avery that the Bank was not open on Saturdays. On Friday, August 10, 2001, Nicholson sent an overnight package to the Bank with documents

demanding payment on the letter of credit. Bodensteiner received the overnight package on Monday, August 13, 2001. Bodensteiner had met with clients on Saturdays on prior occasions, but in this instance, he chose not to go to the Bank to retrieve the Federal Express package.

The letter sent via facsimile transmission was not signed by Nicholson on behalf of Avery, it did not contain the certification required by the letter of credit, and it did not contain the required draft language. Similarly, the overnight package materials did not contain the certification required by the letter of credit and did not contain the required draft language. Furthermore, the documents did not specifically state how much Group One owed Avery. The documents sent via facsimile transmission and overnight mail included a stack of invoices, but when Bodensteiner received the invoices, he could not make any sense out of them. The invoices contained incorrect payment terms and it appeared to Bodensteiner that the amounts were not due and owing on August 10, 2001.

Sometime during the week of August 13, 2001, Bodensteiner spoke with legal counsel. On August 13, 2001, Bodensteiner advised Nicholson that he was instructed to escrow money belonging to the Matthews Group. The Matthews Group's account was frozen by the Bank for approximately 60 days thereafter. Avery sent instructions to the Bank for wiring funds. Bodensteiner never contacted Nicholson after receiving the instructions with regard to the status of the wire transfer of funds. On August 21, 2001, legal counsel for the Bank provided Avery with a letter denying Avery's demand on the letter of credit.

On January 18, 2002, Avery filed suit in this Court claiming breach of contract due to the Bank's refusal to make payments to Avery under the letter of credit. Avery alleges that the Bank anticipatorily repudiated the contract by refusing to make payments under the letter of credit.

III. CONTENTIONS OF THE PARTIES

In its Motion for Summary Judgment, the Bank contends Avery's demand under the letter of credit was untimely. The parties agree that the letter of credit expired on Sunday, August 12, 2001. However, the Bank contends that it fixed 3:00 p.m. as the cutoff hour for handling bank business.¹ The Bank thus argues that Avery's phone call received at 3:00 p.m. on Friday, August 10, 2001, Avery's facsimile transmission received at 4:30 p.m., and Avery's overnight package received on August 13, 2001, were untimely under the express terms of the letter of credit. In response, Avery contends that its demand was timely because: (1) the letter of credit did not require Avery to draw on the letter of credit by any certain time on August 12, 2001; (2) there is no evidence in the record that the Bank in fact adopted a cutoff hour of 3:00 p.m.; and (3) even if the Bank adopted 3:00 p.m. as a cutoff hour, the demand on the letter of credit is not "an item or deposit of money" which may be deemed received on the opening of the next day pursuant to Iowa Code § 554.4108.

The Bank further contends that even if the letter of credit had not yet expired, Avery's demand did not strictly comply with the terms and conditions of the letter of credit. In response, Avery argues that the Bank waived strict compliance with the terms of the letter of credit.

IV. ANALYSIS

A. Timeliness of the Demand

The Court need not determine whether Avery's demand was made timely because even assuming, *arguendo*, that Avery timely demanded payment, the Court finds that

¹Iowa Code § 554.4108(1) provides that "For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of two p.m. or later as a cutoff hour for the handling of money and items and the making of entries on its books." The Iowa Code further provides that "[a]n item of deposit or money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day." Iowa Code § 554.4108(2).

Avery's demand did not strictly comply with the terms of the letter of credit.

B. Compliance With the Terms of the Letter of Credit

The letter of credit is a viable commercial tool because it enlists participation by the issuing bank, which meets its obligation simply by paying on the basis of stipulated documents. *First Nat'l Bank of Council Bluffs v. Rosebud Housing Auth.*, 291 N.W.2d 41, 44 (Iowa 1980). "A letter of credit properly established constitutes an enforceable obligation created by statute in the nature of a contract by the issuer . . . in favor of the beneficiary The duty created in the letter of credit is wholly independent of the underlying contract between the issuer's customer . . . and the beneficiary." *Comdata Network, Inc. v. First Interstate Bank of Fort Dodge*, 497 N.W.2d 807, 809 (Iowa 1993) (citing *Newvector Communications, Inc. v. Union Bank*, 663 F.Supp. 252, 254-55 (D. Utah 1987)). Determination of a bank's duty of performance depends only upon the presentation of conforming documents and not upon the factual performance or nonperformance by the parties to the underlying transaction. *Id.* (citing *Newvector*, 663 F.Supp. at 255).

Iowa law requires strict compliance with terms stipulated in letters of credit. *Comdata*, 497 N.W.2d at 809. See also *Atlas Mini Storage, Inc. v. First Interstate Bank of Des Moines*, 426 N.W.2d 686, 688 (Iowa App. 1988). "Both parties are held to a standard of strict compliance and in the absence of conformity, the beneficiary cannot force payment and the bank pays at its peril." *First Nat'l Bank of Council Bluffs*, 291 N.W.2d at 45 (quoting *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 886 (3rd Cir. 1977)). As the Supreme Court of Iowa noted:

If courts deviate from the rule of strict compliance and insist in certain undefined situations that banks make payments notwithstanding the fact that the beneficiary failed to comply with the terms stipulated in the letter of credit, the certainty that makes this device so attractive and useful may well be undermined, with the result that banks may become reluctant to assume the additional risks of litigation.

Id. at 45 (quoting *Insurance Co. of N. Am. v. Heritage Bank*, 595 F.2d 171, 176 (3rd Cir. 1979)).

In the case at bar, Avery presented its demand shortly before the letter of credit was to expire on August 12, 2001. The Bank had seven business days from its receipt of Avery's demand before it was required to honor or dishonor the demand. See Iowa Code § 554.5108(2) ("An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents: (a) to honor, . . . or (c) to give notice to the presenter of discrepancies in the presentation"). The Court concludes that Avery's demand was not in strict compliance with the terms of the letter of credit because the demand did not comply with the required certification and statements expressly set forth in the letter of credit.² The Bank accordingly gave Avery written notice of dishonor on Tuesday, August 21, 2001.³ Avery could not have cured the defects because any subsequent presentment would have come after the letter of credit had expired. The Court thus finds that by presenting its demand so close to the expiry date, Avery assumed the risk that it would not have time to cure any defects in the presentment before the expiry date. The Court notes that permitting a beneficiary to enjoy an unrestricted right to cure deficiencies after the presentation deadline would render the expiry date virtually meaningless and would effectively subvert the strict compliance standard.

²Avery's demand did not contain a statement signed by an authorized official of the beneficiary certifying that "AN EVENT HAS OCCURRED UNDER THE CREDIT AGREEMENT BY AND AMONG FASSON/AVERY DENNISON CORPORATION AND VERITEC, INC., WHICH ALLOWS THE BENEFICIARY TO DRAW ON LETTER OF CREDIT NUMBER 104." Further, Avery's demand did not contain the required draft language: "DRAWN UNDER MATTHEWS GROUP, LLC STANDBY LETTER OF CREDIT NUMBER 104, DATED MAY 12, 2000."

³The Court finds that the Bank provided written notice of dishonor within seven business days of presentment, whether calculated from Friday, August 10, 2001 or Monday, August 13, 2001.

C. Waiver

The Court further finds that the Bank did not waive strict compliance with the terms of the letter of credit. A waiver is an “intentional or voluntary relinquishment of a known right.” *Black’s Law Dict.* (Rev 5th Ed). Here, the record is devoid of any evidence that the Bank waived strict compliance. Avery has presented no evidence that the Bank stated that it would honor the credit or that Avery’s presentment conformed with the letter of credit’s requirements. The record is clear that the Bank insisted upon strict compliance with each term of the letter of credit. The Court thus finds Avery has failed to create a genuine issue of material fact with respect to whether the Bank waived strict compliance in this case.


The Court therefore holds that under Iowa law and the facts presented herein, Avery has no right of action against the Bank. The Bank’s Motion for Summary Judgment is therefore granted.

V. CONCLUSION

IT IS HEREBY ORDERED that:

1. Defendant The Home Trust & Savings Bank’s Motion for Summary Judgment (docket no. 11) is GRANTED.
2. Plaintiff Avery Dennison Corporation’s Complaint is DISMISSED with prejudice.
3. All court costs are assessed against Avery Dennison Corporation.
4. The final pretrial conference scheduled for January 8, 2004 is canceled. The jury trial scheduled for January 20, 2004 is canceled.

SO ORDERED this 7th day of November, 2003.



LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA